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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-1075X

MANUFACTURERS RAILWAY COMPANY
-- DISCONTINUANCE EXEMPTION –
IN ST. LOUIS, MO

REPLY OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/INTERNATIONAL BROTHERHOOD OF TEAMSTERS TO PETITION FOR STAY PENDING JUDICIAL REVIEW

The Brotherhood of Maintenance of Way Employes Division/International Brotherhood of Teamsters (BMWED) submits this memorandum in opposition to the petition of Manufacturers Railway Company (MRS or Carrier) for a stay of the Board's decision in this docket that was served on July 12, 2011.

I. INTRODUCTION

MRS is a subsidiary of a major domestic corporation (Anheuser-Busch Companies) which in turn is in turn a subsidiary of a mega-international corporation, Anheuser-Busch InBev (AB InBev). MRS's petition for exemption for discontinuance of operations on its lines stated that MRS' rail assets consist of two lines, the "Brewery Line" which serves an Anheuser-Busch brewery, and the "Second Street Line" which services three other shippers who use rail service infrequently. Petition for Exemption at 2-3. MRS

acknowledged that throughout its 120 year history, its "primary purpose was to meet the terminal and switching needs of the Anheuser-Busch brewery." *Id.* at 3. MRS stated that if the Petition was granted, it would not remove the "trackage or rail assets" comprising either the Brewery Line or Second Street Line. *Id.* The Board granted the exemption, but the exemption was subject to the *Oregon Short Line* employee protection conditions.[1]

MRS seeks a stay of the decision to the extent that the exemption was subject to the employee protection conditions. Thus one of the world's largest corporations seeks to stay the STB's decision in order to deny employee protection benefits to a handful of MRS employees who will lose their jobs after MRS discontinues operations, but retains ownership of the lines, remains able to continue to serve its corporate parent, retains the ability to resume service without an application under Section 10901, and obtains the benefits of continued Federal regulation and preemption of state law.

MRS currently employs three workers represented by BMWED: Marlin Foster, who has worked for MRS for almost 40 years; and Robert Bullock and Celtis Andrews, who have each worked for MRS for about 30 years; all are approaching, but are not yet eligible for, retirement.[2]

BMWED respectfully submits that the stay sought by MRS should be

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[1] *Oregon Short Line – Abandonment – Goshen*, 360 I.C.C. 91 (1979).

[2] See BMWED reply to petition for exemption. At the time of that reply, MRS also employed Mr. Thomas Hobbs, but he has since left MRS.

denied because MRS has not shown a likelihood that it will succeed on the merits of its planned petition for review, the balance of potential harms does not support issuance of the requested stay, and issuance of the requested stay does not advance any public interest.

MRS asserts that the Board deviated from precedent. But the Board actually declined to extend an agency "common law" exception to the express command of the Act to a situation that differs from those in which the Board has applied the exception in the past. MRS suggests that the Act should be interpreted in accordance with its economic interests rather than consistent with its actual wording. Petition for Stay at 1, 4-5. But the Board is not obligated to assist MRS and its corporate parents in their financial schemes. Additionally, MRS bizarrely describes the purpose of the employee protection conditions as to facilitate management goals and transportation efficiency; completely ignoring the true purpose of the protective conditions– to protect employees from the adverse impacts of agency authorized actions. *United States v. Lowden,* 308 U.S. 225, 233-234 (1939); *Interstate Commerce Comm. v. RLEA,* 315 U.S. 373, 377 (1942); *New York Dock Ry. v. United States,* 609 F. 2d 83,86 (2d Cir. 1979) MRS also (at 1 n. 1) offers a calculation of alleged costs of employee protections that is unexplained and without substantiation; large numbers are tossed out without any evidentiary support, indeed without any support at all. In the end, while MRS sees itself as "between a rock and a hard

place", it fails to acknowledge that the conundrum its describes is the product of its own choices, not legal error by the Board.

In asserting that it will be irreparably harmed by the Board's decision, and that the employee will not be harmed by a stay, MRS has ignored how the potential harm it cites actually flows from its own choices. MRS also imperiously discounts the substantial financial losses that will be suffered by longstanding employees; and MRS astonishingly indicates that it will not pay its statutorily mandated employee protection obligations if its appeal is unsuccessful. Petition for Stay at 19. Consideration of the true costs of granting or denying a stay, and of the ability of those involved to affect their own circumstances, reveals that the balance of harms does not favor MRS. And the public has no interest in assisting the plan of MRS and its parent corporations to create a new exception to the Act in order to advance its economic interests at the expense of the interests of its employees.

II. ARGUMENT

MRS' PETITION FOR STAY SHOULD BE DENIED

A. MRS Is Not Likely to Prevail on the Merits of its Appeal

MRS is not likely to prevail on the merits of its appeal because its basic legal argument is wrong, the underlying premises for its claims are false, its assertions that the Board deviated from agency precedent are incorrect, and its assertion that the decision was arbitrary and capricious is specious.

In imposing employee protection conditions on the discontinuance of service by MRS, the Board decision applied the Act in a manner fully consistent with its plain language. As BMWED explained in its reply to the petition for exemption, imposition of the employee protections was actually mandated by Section 10903 of the Act. Section 10903(b)(2) requires the Board to impose "as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees." Thus, the Board's decision was fully consistent with the language of the Act.

However, as the Board observed, the ICC held that despite the wording of Section 10903, it would not impose employee protections in two situations: entire system abandonments and complete discontinuances on lines the carrier does not own. *E.g. Northampton & Bath R.R. – Abandonment – Northampton County, PA*, 354 I.C.C. 784 (1978), 1978 ICC LEXIS 7 and *Wellsville, Addison & Galeton R.R. – Abandonment – Entire Line*, 354 I.C.C. 744 (1978), 1978 ICC LEXIS 23. July 12 Decision at 3. n.5. MRS claims that the Board departed from this precedent and created a new rule when it imposed employee protections in the instant case.

But the instant case does not involve either an entire system abandonment or a discontinuance on lines not owned by the carrier, so this case does not fit either exception to the statutory directive, and the Board did not depart from established precedent. Since neither exception applies here,

the default position is necessarily application of the Act as written, which mandates imposition of employee protections in discontinuance cases. In fact, MRS did not actually seek application of an existing exception, but rather sought creation of a new exception to fit MRS' own circumstances and convenience. However, the Board was under no obligation to create a new exception; and it certainly was not arbitrary and capricious in refusing to do so.

Furthermore, the circumstances of the instant case are not even like the situations in which the two recognized exceptions to the rule are applied. In the two exception situations the carriers involved definitively walk away from service and common carrier status on the lines involved. In one situation the the carrier fully abandons its system, ceases being a carrier and is no longer subject to agency jurisdiction. In the other situation, a carrier that does not own the line on which it operates relinquishes its entire interest in the line when it stops providing service on the line. By contrast, in the instant case MRS will retain ownership of the line, will have the ability run private train service on the line, and can easily resume common carrier service on the lines (a possibility and potential opportunity that MRS readily acknowledges, Petition at 11). Furthermore, as MRS admits (Petition at 11), by only discontinuing service on its lines while not abandoning them, MRS remains subject to STB jurisdiction so state regulation, zoning and environmental laws and regulations

and exercise of eminent domain are all preempted by Federal law. *See also Hayfield Northern R.R. Co. v. Chicago and North Western Transp. Co.*, 467 U.S. 622 (1984); *Chicago North Western Transp. Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311 (1981); *Franks Investment Co. v. Union Pacific R.R.* 534 F. 3d 443, 445-446 (5th Cir. 2008); *CSX Transp. v. Georgia Public Service Comm.*, 944 F. Supp. 1573, 1581-1584 (N.D. Ga 1996); *Burlington Northern Santa Fe Corp. v. Anderson,* 959 F. Supp 1288, 1294 (D. MT 1997). If MRS chose to actually abandon the lines it would have relinquished all of those advantages. But MRS decided not to abandon the lines and instead sought to retain those advantages. While it was entitled to make the choice it did, it has no statutory (or Constitutional) right to retain the advantages of not abandoning the line, but also obtain the release from statutory employee protection obligations that come with an actual abandonment.

For the same reasons, MRS' "catch -22" argument is fallacious too. MRS asserts that the Board's decision presents the carrier with an insoluble problem: it must either continue to operate at a loss, or discontinue service without current revenue from shippers and not pay employee protection benefits thereby risking civil penalties. Stay Petition at 9, 11-12. But MRS has ignored the role played by its own choices. It sought to discontinue opertations but to remain a carrier and subject to the STB's jurisdiction; MRS desired to cease operations but retain the benefits of continued carrier status and STB

jurisdiction. MRS could have filed for abandonment in which case it would not have been faced with the conundrum it now complains of; but it chose not to do so because it believed it advantageous to continue to be a carrier subject to Federal regulation. Or, MRS could continue to operate at a loss, not solely to avoid paying employee protection benefits, but because continued carrier status (and preemption of state law) is worth something to MRS and its parent corporations. Thus, the "problem" that MRS is complaining about is one of its own making, not a result of legal error or arbitrary and capricious action by the Board.

MRS argues that the Board is effectively forcing an abandonment because that is the only way for MRS to avoid employee protection obligations. Stay Petition at 10-13. But the Board is not forcing any action by MRS and is certainly forcing MRS to file for abandonment. The Board simply followed the Act and its own precedent-the MRS plan was covered by Act's requirement for protection of adversely affected employees and the plan did not fit one of the two exceptions to that statutory requirement. The Board just did not provide MRS with the benefit of exception from employee protection obligations in a situation where the statutory mandate for employee protection is clear and there is no agency "common law" for an exception in the circumstances presented by MRS.

In reality, MRS is complaining about the economic consequences of its

own decisions. If MRS wants the benefits of remaining a carrier and being subject to STB jurisdiction then there are costs that come with that choice. If MRS wants relief from those costs it can abandon the lines, but thereby forego the benefits of remaining a carrier and being subject to STB jurisdiction. All of this is within MRS' control; and the Board has not forced MRS to go one route or the other. What the Board has declined to do is to create a new alternative middle course, where MRS gets "the best of both worlds" for its own self-interest; MRS wants the Board to facilitate the option that creates the greatest financial advantage for MRS. But the Board is under no obligation to do so; and its refusal to create an option that best suits MRS' goals is not a violation of the Act.[3]

MRS asserts that the decision is arbitrary and capricious because the Board supposedly departed from established policy without a reasoned basis for doing so. MRS claims there is no difference between an entire system abandonment and a discontinuance of service where the carrier owns the property but does not file for abandonment and remains a carrier. Petition for Stay at 12-13. This argument too is fallacious.

The Board's decision is consistent with the plain language of the Act and there is no precedent that supports ignoring the Act's mandate in the

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[3] And although MRS repeatedly suggests that its rights under the Constitution were violated, the Constitution does not guarantee the ability of a corporation to effectively design business arrangements that maximize its profits.

circumstances presented here. The Board's decision cannot be arbitrary and capricious when it is consistent with the Act.

Furthermore, there has been no policy change. The Board has never created or applied an exception to Section 10903(b)(2) to a discontinuance where the carrier owns the tracks on which it operates and it does not seek abandonment authority and remains a carrier.

Additionally, the distinction recognized by the Board is entirely rational. In the situations where the Board has applied common law exceptions to Section 10903(b)(2), the carriers were leaving the industry entirely and were no longer carriers, or were permanently departing from lines that they did not own, relinquishing all common carrier obligations (and the benefits of carrier status) on those lines. Those carriers were no longer subject to Board jurisdiction at all, or on the lines in question. By contrast, in the instant case, MRS will remain a carrier and will be subject to STB jurisdiction and exempt from state law. Accordingly, this case is indeed different from the cases where the Board has not applied Section 10903(b)(2).[4]

Because MRS's legal arguments are entirely without force, it cannot show

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[4] MRS (Petition for Stay at 15) challenges the Board's rationale for its decision- that no carrier is left behind in the cases where the exception was applied whereas a carrier will remain in this case. MRS asserts (*id.*) that uncited precedent referenced earlier in its petition for stay supposedly makes it "clear" that the exceptions were not based on the fact that no carrier remained, but rather were based on the fact that no operating carrier remained. But MRS does not actually cite cases or refer to previously cited cases that support a precedential distinction between situations where no carrier remains and those where no operating carrier remains.

that it is likely to prevail on the merits of its planned petition for review, so its request for a stay should be denied.

B. The Balance of Harms Does Not Support Issuance of a Stay

In arguing that it will be irreparably harmed if its stay request is not granted, MRS ignores its own choices and how its own choices will be the cause of the harms that it claims will occur if the Board does not stay its decision.

MRS made a deliberate decision to seek discontinuance authority without abandonment because there was some perceived advantage to MRS in proceeding in that way. The alleged harms it cites flow from its own decision, not from the Board's decision. Furthermore, MRS cavalierly dismisses as insignificant the concerns of its longstanding employees who have literally kept the railroad running for several decades. Indeed, MRS implies (Petition for Stay at 13-14) that those employees are exploiting MRS by seek enforcement of the Act, when it is MRS that seeks to exploit and pervert the Act by evading statutorily mandated protections for the workers who made sure there actually were rail lines that MRS could operate.

BMWED submits that MRS will not be harmed by the Board's decision because any harm it might suffer is entirely attributable to its own decisions and efforts to obtain the benefits that would accrue to it and its corporate parents from a discontinuance rather than an abandonment, while improperly

seeking to evade the obligations that necessarily flow from the course of action it chose. Since the harm alleged by MRS derives entirely from its own choices, there is no basis for MRS to argue that it will be irreparably harmed by the Board's decision.

Furthermore, MRS just dismisses the harm that would be suffered by its employees if the stay is granted. But, if the stay is granted, employees who devoted decades to working for MRS, who are 50 and 60 years old, will lose their jobs and thus their sources of income and health insurance in an economic environment where finding new work is extremely difficult. And those employees are likely to lose their "current connection" to the railroad industry for railroad retirement benefits calculations when they are just short of retirement eligibility. To MRS this is apparently insignificant, but to the workers, it is of the utmost importance.

Then, MRS says that the Board should not worry about the potential harm to the workers because "if MRS loses its appeal, it still would have no shipper revenues with which to fund the labor protective conditions. In other words, nothing would change with regard to the availability of funds that the Board may require be used for labor protection, and the affected employees would therefore be no worse off if the stay is granted". Petition for Stay at 19. Thus, according to MRS, the Board should not worry about harm to the employees because the Carrier has no intention of actually paying the

statutorily mandated employee protections that are a direct result of its own petition. MRS baldly states that it will simply refuse to comply with the Act if the Board does not create a new exception to Section 10903(b)(2), so the employees will be harmed either way.

BMWED submits that MRS' own petition demonstrates that the balance of potential harms does not favor issuance of the requested stay. Additionally, to the extent that a stay is inherently an equitable remedy, MRS' cavalier dismissal of the concerns and interests of its employees, and its openly stated disdain for the requirements of the Act deprive MRS of any right to a stay.

C. The Public Interest Does Not Support a Stay

MRS invokes a supposed public interest by again asserting that the Board departed from longstanding precedent. Petition for Stay at 19. As BMWED has shown, the Board did no such thing, so MRS has no basis for asserting a public interest in proper application of the Act.

MRS also claims that the public interest supports its efficient winding down of a failing railroad, and relieving MRS' parent corporations of any need to subsidize MRS' operations. BMWED submits that the public has no interest one way or the other in the profitability of MRS and its corporate parents, and, in the context of the ICCTA, the public certainly has no interest in the success of MRS and it parents once MRS is not actually providing common carrier service.

Furthermore, the actual public interest here is expressed in Section 10903(b)(2)-the statute directs that when a carrier discontinues operations but does not abandon its lines, its employees are entitled to employee protection benefits. If MRS disagrees with that policy choice, if it believes that payment of such benefits is economically inefficient, MRS and its parents can seek to amend the Act. But as the statute is now written, the public interest lies with MRS' compliance with its statutory obligations.

Additionally, to the extent that anyone other than MRS and the shareholders of its corporate parents might have an interest in the efficient winding down of MRS, the public certainly does not have an interest in the winding down of MRS in such a way as to maximize the realization of potential financial benefits to those entities by allowing MRS to obtain the benefits of a discontinuance while evading the statutorily mandated obligations that attach to a discontinuance.

Thus, MRS cannot show that the public interest support issuance of the stay it requested.

CONCLUSION

For all of the reasons stated herein BMWED respectfully submits that MRS' petition for a stay of the Board's decision should be denied.

Respectfully submitted,

/s/

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August 5, 2011

CERTIFICATE OF SERVICE

I certify that I have this day caused copies of the attached Reply to Petition for Stay Pending Appeal to be served on the following by First Class Mail and electronic delivery to:

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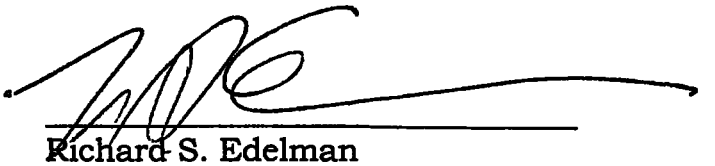

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